No. 114.

Kepley Byg. & Mackey Co.

Filed Nov. 9, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 114.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W. PAINE ET AL., APPELLEES.

BRIEF FOR APPELLANTS IN REPLY TO BRIEF FOR APPELLEES.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-8-'97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 114.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W. PAINE ET AL., APPELLEES.

BRIEF FOR APPELLANTS IN REPLY TO BRIEF FOR APPELLEES.

The counsel for appellants does not file this brief to re-argue the law pertaining to this case, but for the purpose only of correcting certain misstatements as to the state of the record which appear (without doubt unintentionally) in the brief for appellees, and also to correct certain misapprehensions of the learned authors of that brief as to cases and statutes cited by us in our brief. In doing this we shall take up their brief and, noting the pages upon which the subject-matter of comment is contained, briefly reply thereto.

Pages 6 and 7.

The statement on these pages as to three suits in ejectment having been brought by the appellants and afterwards *dismissed* has nothing in the record to support it. The pages referred to in support of this statement, to wit, pages 49, 18, do not show that such suits were ever even commenced. It is true, counsel there stated that he offered in evidence the *record* of certain suits, but he did not produce the said records and they *never were in the case*, as is shown by the certificate of the clerk of the Court of Appeals, in which it is stated that the record sent here is "a true copy of the transcript of the record and proceedings," &c. The certificate in effect states that appellants have brought up *everything* that was before the court below. The record of these ejectment suits is not in the record here, and therefore were not in the court below. It is manifestly unfair, then, to argue upon alleged facts *dehors* the record. It is true that Mr. Justice Hagner spoke in his opinion of these suits, but in doing so he spoke of a matter not in the record, as he did of other matters not in the record. If counsel had desired the record of these suits to become a part of this record he should have complied with the rules of court and filed certified copies of them. It was not our duty to ransack the files of the court for these papers nor to file certified copies of them merely because counsel said he "offers them in evidence." Suppose he had said he offered in evidence the record and proceedings in fifty suits as they appeared among the files of this Court, would it have been our duty to have hunted up these suits, procured certified copies, and put them among the records of this case? Certainly not. If it was the defendant's intention to show that any of these suits which he speaks of had ever been brought, it was his duty to have procured certified copies of the papers and filed them in the record, and then, and not until then, are they in evidence, and then, and not until then, is it the clerk's duty to copy them into

the transcript of the record. So that there is no proof in the record that these ejectment suits ever were brought. It is not of any very great consequence whether they were brought or not, but were any such matter in the record the appellants would be able to show an excellent reason for its existence. As an illustration, we might suppose the death of a life tenant who brought the suit, necessitating its dismissal and the bringing of a new suit in the name of the reversioners, or we might be able to show the inability to obtain service upon the defendant John W. Paine because he had constantly evaded service, not only out of court but in court, by obtaining the quashing of orders of publication against him on the ground that service by publication in ejectment was not allowed in the District of Columbia. (See Staffan *vs.* Zuest, XXV Wash. Law Reporter, 188.) But it is folly to argue upon facts not in the record, and, declining to follow the example of counsel for appellees, we shall not attempt it.

Page 7 contains the following:

(*a.*) "Nor is it denied that it was the intention and purpose of Mrs. Ransom and her husband to give to her brother full power and authority to dispose of her interest in this property.

(*b.*) "It is nowhere denied that he undertook to execute that power;

(*c.*) "That the consideration was actually paid by Benj. Ogle Tayloe, nor is it anywhere denied that the consideration was received by Mrs. Ransom."

In reply we say (*a*) that it is denied most emphatically that Mrs. Ransom and her husband ever gave, as matter of law, to her brother "full power and authority to dispose of her interest in this property." The alleged power of attorney gave no "power and authority" to her brother to dispose of the property, and, moreover, the instrument itself was not, as matter of fact, executed with the remotest inten-

tion that her brother should sell the property *at the time* he did, under the *circumstances* he did, nor for the *price* he did. The record shows (pp. 39, 40, testimony of Mrs. Ransom's sister) that this paper was executed in 1859, when General Ransom was a young lieutenant in the United States Army. He had been ordered West and was in need of money to take his family out with him. The paper was executed to enable his brother-in-law to make an *immediate* sale of the property, but for some reason no sale was made. Time passed on, the war came on, and Robert Ransom, from a poor lieutenant in the United States army, had become a major general in the Confederate army. All the circumstances of time, place, and condition had changed as much as they could possibly be changed, and the paper itself was probably forgotten, if not lost, until under stress of the affairs of Mrs. Gibson and her brother, who, finding they could not make title without this paper, suddenly thought of it, through their then attorney, Mr. Walter S. Cox, and used it for *their* benefit and not for the benefit of Mrs. Ransom, who, if she ever did receive any benefit from it, did not, upon their own showing, do so until several years afterward, by which time the war was ended. (*b*) It is also emphatically denied that he (Gibson Huntt) ever "undertook to execute the power." What Gibson Huntt undertook to do for Benj. Ogle Tayloe was to sign a paper agreeing to get the signatures of Mr. and Mrs. Ransom to a deed some time in the future. There was nothing in the paper authorizing him to do this; nor in fact did he ever "bargain and sell" the property to Benj. Ogle Tayloe. Judge Cox made the "bargain and sale," and then sent on to him a paper to sign, which under the alleged power of attorney he had no power to sign, even supposing the power of attorney otherwise valid. No power was given Judge Cox to sell Mrs. Ransom's property. He says he did it "at the immediate request of Mrs. Gibson" (Rec., p. 46). If the power of attorney was valid the only person who could sell Mrs. Ransom's property was

Gibson Huntt, *delegatus non potest delegare.* (c) Again, it is emphatically denied that there is any proof in the legal sense that Mrs. Ransom received the purchase-money, or that, if she did receive it, she received it knowing it to be such. Mrs. Gibson says (p. 36) she "either paid it over to her or spent it for her at her direction, *as far as she can possibly remember.*" This *one line* of testimony is relied on by the appellees as proof that Mrs. Ransom knowingly received the purchase-money, because they are compelled to take the position that she received it knowingly or else abandon their case. Mrs. Gibson, a lady whose veracity is not questioned in the slightest, shows her respect for the obligation of an oath and will not venture to say positively that Mrs. Ransom received this money. She will only venture upon what is equivalent to such expressions as "I think so" or "I believe so" or "As far as my memory serves me," "I am not positive, but as far as I can possibly remember I either paid it to her or spent it for her at her direction." Without the slightest intention to reflect upon the witness, we respectfully ask, as a test of what this witness proves, whether she could be convicted of perjury upon a charge that she had sworn Mrs. Ransom received the purchase-money, even if a thousand witnesses swore that she had not received it? Most assuredly not, for the excellent defense would be that she had not so sworn; nor in an action for money had and received could it be recovered upon the testimony of a witness who swore to no more than "I either paid it to him or spent it for his benefit, as far as I can possibly remember." It is respectfully submitted that to charge a married woman with estoppel on the ground that she had knowingly received the purchase-money the evidence must be more reliable than this. It is almost as bad as "*non mi recordo.*"

On the other hand, the contract of sale made by Gibson Huntt expressly declares that he (Huntt) would at some time in the future get from Mrs. Ransom a regular deed of conveyance, and the fact that no such deed was obtained,

notwithstanding its very great importance to the grantee, is pretty good evidence that they could not get it because Mrs. Ransom refused to give it. Why did she refuse to give it? They admit she was an honorable lady. Why did they not apply to the courts to compel her to specifically perform this contract during her life if they were so certain that she received the purchase-money, and that she was bound by it?

But it is submitted this case is not to be tried upon such considerations. If the appellants' counsel had conceived that the door was to be thrown open for the trial of this case upon the ethics of human conduct, good and sufficient reasons might have been given why this sale to Benj. Ogle Tayloe should be condemned as a transaction which the heirs of Mrs. Ransom are not under the slightest moral obligation to recognize. The vice of going outside of the *law and facts* of a case to moralize upon a situation when *all* the facts are not, and cannot, in the wisdom of the law, be before the court is sufficiently demonstrated by this attempt of appellees' counsel to stigmatize after his death a gentleman like General Ransom, who was well and publicly known during his lifetime as a man of the highest integrity; and their attempt also to cast upon Mrs. Ransom's children a reflection upon their honesty. Let counsel try this case *upon the law*, and let them not seek to break into chambers whose doors are locked and should continue to be locked. The purity of the motives of appellants is not before the court, but the question of their *rights under the law* is, and we are here to try that question and none other.

Page 9.

"It appears the object of the sale was the benefit of the Ransom family, and that the money was used for the benefit of the Ransom family."

As to the latter part of this statement we have to say that there is not a scintilla of proof to sustain it, unless it be from

the fact that it is *claimed* that Mrs. Ransom received the purchase-money, and *therefore* (?) her family got the benefit of it. As to the first part of the statement, viz., that "the object of the sale was the benefit of the Ransom family," there is also not a scintilla of proof to sustain it, while, on the other hand, we have pointed to the proof that it was not and could not under the circumstances have been for their benefit. Counsel for appellees refer to page 39 of the Record to sustain their statement. They have evidently only read the first few lines of that portion of the testimony as contained on the bottom of the page and failed to turn the page and read to the conclusion. An attentive reading of Mrs. Gibson's testimony upon this point, where she says "it was sold more especially for the benefit of General Ransom's family," will show that she meant nothing of the kind. Let us read it:

"Q. Did you have any communication with your sister with regard to this property during the war?

"A. I have no recollection of it at all. I know there never was any question about it.

"Q. I don't mean with regard to the seven hundred dollars. I mean in regard to the property.

"A. *I never spoke to her on the subject.* I do remember that the property was sold at the suggestion of General Ransom and for their benefit.

"Q. That was during the war?

"A. Before the end of the war; it was sold in good faith. It was sold more especially for the benefit of General Ransom's family. It was unimproved property and the taxes were eating it up.

"Q. It was, then, just because your family supposed at that time that General Ransom and his wife, Mrs. M. Ransom, were in need of this money that the property was sold?

"A. Well, yes. I think his expenses were very high and he wanted money.

"Q. At that time he was an officer in the Confederate army?

"A. *I am talking of the time the power of attorney was given.*"

So that this lady, in her confusion from being upon the witness stand, uses language at first which it is plain did not convey her meaning. She meant the power of attorney was given because at that time (1859) General Ransom was needing money, and he was requesting that the property be sold. The learned counsel will hardly seriously contend that General Ransom, a major general in the Confederate army, communicated by some underground railway with his relations at the North and requested them not only to make a sale of this property, but desired that they should render themselves liable to arrest and imprisonment by remitting the proceeds to him through the enemy's lines.

In more than a half dozen places in their brief appellees' counsel refer to this particular piece of testimony to sustain their assertion that the property was sold for General Ransom's benefit. We ask, therefore, that whenever the Court shall meet with that assertion it will bear in mind this criticism of it.

Page 10.

"As far back as 1864 Benj. Ogle Tayloe got a tax deed for the property because of the default in the payment of taxes.

"It is not necessary to claim that this deed vested the legal title in Tayloe. It was not offered for that purpose; but it was evidence of a claim and color of title in Tayloe as far back as 1864."

The criticism of this statement is, *first*, that as Benj. Ogle Tayloe was our cotenant, his purchase of the property at a tax sale inured as much to our benefit as to his. A tenant in common cannot buy at a tax sale and hold under the deed adversely to his cotenants; and, *secondly*, even if he could, it is not attempted to show that there was an adverse occupancy of the property for such a length of time as to ripen into a legal title. Indeed, Mr. Paine's own testimony shows that it was only a few years before the bring-

ing of this suit that the property was occupied by any one. It is agreed all round that up to that time it was a *vacant* piece of ground. Moreover, if the appellees claim under the tax deed they are estopped to deny that we are tenants in common with them.

Page 12.

"The statement in complainants' brief (p. 23) that the court of appeals of Maryland (Campbell *vs.* Lowe, 9 Md., 500, 511) held the contrary, and that showing title by one out of possession would sustain a bill for partition is incorrect.

"By reference to the facts in that case it appears that the complainant Campbell claimed an undivided moiety of the land by virtue of a sheriff's deed, and instead of being *out of possession* the report shows he was *in possession*, having been 'PUT IN POSSESSION UNDER A WRIT OF *habere facias*.'"
Campbell *vs.* Lowe, 9 Md., 501.

The learned counsel for the appellees are unfortunate in their examination of the case of Campbell *vs.* Lowe. It is true that the complainant in that case stated in his bill of complaint that he had bought the interest of one of the two tenants in common under a *fi. fa.* issued thereon, and that the sheriff's deed had been "duly executed and the complainant put in possession under a writ of *habere facias*," but we all know how the purchaser of an undivided interest is "put in possession." The sheriff merely returns on his writ that he has done so, and then the party is supposed to be *constructively* in possession of his undivided interest. That it was so done in the case cited is plain from the answer of the cotenant, "That complainant has *never been in possession* of any part of the property, *and the sheriff never delivered* ACTUAL *possession of any part to him*," and that answer, being directly responsive to the bill, was necessarily taken as true by the court unless it was overcome by the testimony of two witnesses, and as

the case appears from the report it was not attempted to be contradicted; so that, notwithstanding the attempt to correct us, we still insist that we were not "incorrect" in our statement of the case of Campbell *vs.* Lowe.

Page 13.

"And Professor Washburn, speaking of the rule laid down in some States that a married woman, even jointly with her husband, cannot execute a valid power of attorney to make a deed of her interest in real estate, says:

"'But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by *statute* in Massachusetts; and a similar right is also recognized by *statute* in New York.'"

3 Washburn, Real Prop., 232, 233.

Certainly where the married woman can do "the principal thing herself," viz., convey her estate as a *feme sole*, she can likewise convey by power of attorney. We have asserted this more than once in our brief. Nor have we ever denied that by *statute* a married woman may convey her common-law property, and this citation only supports our proposition that *except by statute* such a conveyance cannot be made.

Page 15.

Counsel for appellees are equally unfortunate in their statement (p. 15) that—

"Powers of attorney by *baron* and *feme* to convey the lands of the wife were not unknown or unused in the early days of the colonies. * * * Such a power of attorney appears not only to have been recognized by the court, but judgment given in favor of the validity of the deed made thereunder so far back as 1738." (Elliott's Lessee *vs.* Osborn, 1 How. & McH., 146.)

A reference to the head-note of that case (which exactly states the case) will show how much the learned counsel have misstated that decision. The head-note is:

"An *acknowledgment* of the deed of a *feme covert*, made by an *attorney* in open court, in pursuance of a power *annexed to the deed*, is valid."

The "attorney" and the court in that case, unlike counsel for appellees, knew very well that the acknowledgment, though made in 1695, was, under the act of Maryland of 1671, referred to in the preamble of the act of 1715, and of which the said act of 1715 was but a re-enactment with some additional provisions. If the learned counsel had examined that case a little closer, or, perhaps, a good deal closer, than they have apparently done, they would have seen that the conclusion to which they at first so hastily jumped was entirely erroneous.

Page 20.

"The complainants' counsel contends (Brief, p. 31) that the act of March 3, 1865, could not have the effect of giving validity to this power of attorney, because it applies only to the acts of attorneys that a married woman could legally appoint as to some separate estate which she had a power to deal with as a *feme sole*, and as to which she could appoint an attorney.

"As to this proposition, it is to be noticed that complainants' counsel do not explain why a statute should be passed validating powers of attorney which are already valid, and it is submitted that this act was designed not to declare good that which was clearly valid, but to declare to be effectual certain *attempted and intended* conveyances which were either invalid or doubtful in law."

Complainants' counsel is not required to explain a proposition which he never made. A married woman with power to convey her estate as a *feme sole*, and consequently having power to convey by attorney, might very well find the con-

veyance by attorney *defectively* executed. The purpose of this statute was to cure the defect and make that valid which until then was invalid; but the reply to the argument of appellees' counsel will be found in the reading of the act itself. Among its purposes was to declare that deeds which had been acknowledged by powers of attorney (see provisions of the Maryland act of 1715), but *defectively* acknowledged by the attorney, should nevertheless be valid by virtue of the curative powers of this act of Congress. That act recognized the fact that married women, being "out of the province" and having equitable separate estates which they could convey as *femes sole*, might have found it necessary to send on their executed deeds to be acknowledged "in the provincial or county court where such lands or tenements lie," the deed being accompanied with the power of attorney to acknowledge it, as provided by the statute of 1715. Now if, as often happened, such a power of attorney was defectively executed, it was cured by the act of Congress of 1865 and made "effectual and sufficient," if the power of attorney "had such acknowledgment of the same as would be sufficient *under the provisions of this act* (act of 1865) to pass her estate and interest therein were she a party executing the deed of conveyance." That was the plain purpose of the act—that is to say, stating it in other words, the act validated deeds of conveyance made by married women having estates which they had the power to convey as if they were *sole*, and therefore power to have the same acknowledged by an attorney-in-fact under the provisions of the act of 1715. Having this power and attempting to execute it, the act of 1865 contemplated that the attorney-in-fact might possibly have defectively acknowledged the deed, and hence the act was intended, among other things, to cure these defective acknowledgments as well in the case of married women having equitable estates as *femes sole* as in the case of other persons. It plainly never was its purpose to give any new power to a married woman, and especially not

to empower her to convey her common-law property in any other way than by joining with her husband under the requirements of a privy examination.

Page 24.

"The appellants also contend that the act does not apply, because the defendants were not in possession on March 3, 1865. This is wholly unsupported by the facts in the record. It is conceded that Tayloe, as tenant in common, had title in fee, and there was no one in adverse occupation. The tax title was acquired in 1864, and the deed from George Gibson Huntt in January, 1865. Clearly, where there was no adverse occupation, this is ample evidence of possession by Tayloe at the date of the act."

That is to say, although the statute expressly declares "in favor of persons in *actual* possession," nevertheless a *constructive* possession is sufficient! When a tenant in fee-simple has not the actual possession, and no one else is in actual possession, inasmuch as there must be a possession somewhere, the law gives the party having the title what it calls a "constructive" possession. If the statute had said "in favor of persons in possession," the argument of appellees' counsel might well apply; but it has not said so; it has limited the possession to an *actual* one.

As to the proposition contained in the next paragraph of appellees' brief, viz., that the actual possession intended is that at the time of trial, when the deed is relied on as a defense, we need only call attention to the title of the act itself in addition to what we have already said upon the subject. The title of the act is (p. 45 of appellees' brief) "An act to quiet titles in favor of parties in actual possession of land in the District of Columbia," meaning, undoubtedly, those *then* in actual possession, and not those who might thereafter get into possession. If appellees' construction be the true one, then the act of 1865 placed it in the power of a wrong-doer to eject a party who was in actual possession at the time of the passage of the act

under a defective deed cured by the act, and then when he, the ejector, was sued in ejectment by the ejected party, have it in his power to reply that the defective deeds were not to be considered as cured when offered in evidence by the party ejected and out of possession at the time of trial, for, to use the language of appellees' counsel, "It was not the purpose of the act to *disquiet* titles by permitting persons out of possession to recover by them," viz., the deeds which the act undertook to cure. Let us bear in mind this is the argument of appellees, viz., that, conceding we have no title, yet if appellants were in possession and appellees out of possession, the latter could not at the trial insist that the deeds they now claim under were cured by the statute, because that statute is only intended to protect those who are *in possession* at the time of trial. Hence, on their own showing, once let us put them out of possession and their deeds are of no benefit to them, for the act, they tell us, is only intended to benefit those in possession at the time of trial, or, which is the same thing, at the time of bringing the action. Surely the appellees' counsel are hoisting themselves by their own petard.

Page 25 et seq.

In so much of appellees' brief as is devoted to the discussion of the question whether the power of attorney was revoked by the war, we wish to say that much of their industry has been wasted, if in their successful attempt to show that an agency to collect debts was not revoked by the war they have intended to combat anything said by us, for we have expressly said more than once in our brief (see especially p. 40) that such agencies are held not to be revoked.

Page 40.

The authorities cited on this page by appellees to show that a married woman is estopped by the receipt of the purchase-money are none of them in conflict with our proposi-

tion. We have repeatedly said, almost in the language of the authorities cited, that while the law protects a married women "it gives her no license to commit a fraud" (Bein *vs.* Heath, 6 How., 247)—that is to say, if she by any fraudulent acts or representations has induced one to pay her money for her property, she will not be allowed "to retain the benefits of the transaction which she has solicited and at the same time to disavow it" (Book *vs.* Porter, 99 U. S., 329). No one will for a moment seriously contend that Mrs. Ransom solicited Tayloe to buy from her or to pay her any money. He never saw her and never paid *her* a cent, nor did she know for years afterwards, if she ever knew, that he claimed she had sold him her property. (See Bank *vs.* Rice, 4 How., 242; Oglesby Coal Co. *vs.* Pasco, 79 Ill., 164.)

We have not deemed it necessary to reply to every statement of our learned friends where they have differed with us; we are content to let our brief speak for itself; but we have deemed it our duty, even at the peril of wearying the court, to point out the inaccuracies we have alluded to. With a full appreciation of the importance of the questions of real-estate law raised by the case at bar and an honest conviction that we are right in our contention, the case is respectfully submitted for the consideration of the Court.

FRANKLIN H. MACKEY,
Solicitor for Appellants.